IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1314

WILLIE LEE KILPATRICK, COURTNEY BROWN, HERBERT BELL, SAMUEL HORNE, ALPHONZO JONES,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

SUPPLEMENTAL ADDENDUM TO REASONS FOR ALLOWANCE OF WRIT OF CERTIORARI RELATED TO THE JURY QUESTION

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As an addendum to the reasons for allowance of the Writ of Certiorari sought to review the judgments below, to be added to those reasons terminating in the filed petition on page 46 thereof, the petitioners cite the following facts and circumstances which have, following the printing of their petition become critically important to the issuance of the Writ of Certiorari sought.

On March 23, 1971, in the Eastern District of Michigan, the HON. ROBERT E. DE MASCIO, in the

case of *United States v. Coleman, Black,* and *Foster,* being CR #s 6-81420, 6-81329, and 6-81452, quashed existing indictments because of the Court Clerk's failure to follow the Statutory Scheme for the filling of the Master Wheel, in accordance with the strict provisions of the Jury Plan.

In quashing the indictments Judge DE MASCIO cited the case of *United States v. Okiyama,* 521 F.2d 601, 9th Cir., 1975, as standing for the proposition that a showing of prejudice by a complaining defendant, resulting from a failure to comply with the provisions of the local Jury Plan, need not be made to entitle such defendant to the quashing of his indictment. All, he claimed, need be shown is the violation, and that, of itself, entitles the defendant to quashing of his indictment.

Because of the announcement of Judge DE MASCIO's opinion, three prosecutions and three indictments have been quashed; and doubtless there will be many more to follow in the wake of this decision.

However, as is true in the within case, JUDGE FEIKENS, whose order sustaining the indictments herein is now being appealed to the Supreme Court, again, in the case of *United States v. Henry William Tarnowski,* CR #6-81003, filed March 17, 1977, again refused to give the jury plan such an interpretation, and declined to quash indictments similarly affected by the same practices as those dealt with by Judge DE MASCIO in the Coleman, and companion, cases.

What was stated by Judge DeMascio in his opinion bears reprinting here to wit:

The identical issues presented in these cases were considered and decided by the Honorable John Feikens in *United States v. Henry William Tarnowski,* Crim. No.

6-81003 (filed Mar. 17, 1977). I sincerely regret that I cannot adopt the holding in *Tarnowski.* A discussion of that opinion, I am sure, will clarify the reasons for my disagreement. In *Tarnowski,* the court concludes that "time is not of the essence of the Act." I am persuaded, however, that the time requirements set forth in the plan are as essential as any other provision. It is this very time requirement that assures the mechanical process that Congress intended and that guarantees that the Master Wheel will contain, at all times, a cross section of the community. The Act certainly anticipates that time is an essential consideration. The Act provides that the interval for refilling the Master Jury Wheel is to be established in the plan. By amending the Act in 1972, Congress made it apparent that time was an essential feature in the plan by specifying that no plan would extend beyond four years without refilling the Master Jury Wheel. When our court, on December 8, 1976, amended the plan to provide for refilling the Master Jury Wheel every four years, the reviewing panel refused to approve the backdating of that amendment, no doubt believing the plan had conferred a statutory right. The court in *Tarnowski* reasons that "... Congress intended that voter registration lists should be supplemented by other sources whenever the voter registration lists [do] not adequately reflect a cross section of the community." This district had declared, however, and the reviewing panel has agreed, that voter registration lists are a completely adequate source to assure a cross section of the community. Our plan specifies the use of voter registration lists and makes no provision for obtaining names from any other source. The plan specifically provides for refilling every two years *as new voter registration information* becomes available.

Next, in *Tarnowski,* the court concludes that a court must find that there has been a substantial failure to comply with the Act, and "the question cannot simply be–is there a substantial failure to comply with *the plan*?" Thus, the court in *Tarnowski* distinguishes between the statute and the plan. This district, however, formulated the plan because it was required by the statute to do so. I believe that the Act and the legislative history supports only the conclusion that the plan is incorporated into the Act and is one and the same. Nor can I agree that the cases relied upon by Judge Feikens support the *Tarnowski* conclusion that a defendant must show that the deviation resulted in a Master Jury Wheel which does not "mirror the structure of the community." 1968 U.S. Code Cong. & Ad. News at 1805. To require the defendant, as the court does in *Tarnowski,* to demonstrate that there has been a failure on the part of the Clerk to provide a fair cross section of registered voters in the Master Jury Wheel is to require the defendant to demonstrate prejudice. But the Act gives a defendant the right to rely upon the district plan. It is the plan that gives a defendant assurance that the Wheel will at all times contain a fair cross section of the community. When that plan is substantially violated, a defendant may rely on the fact that the Wheel is deficient for "procedural regularity is the measure of the validity of the selection system." 1968 U.S. Code Cong. & Ad News at 1805. Nor do I believe that the inquiry whether the Clerk's conduct was deliberate or merely nonfeasance is not relevant. The simple fact is that there was a substantial failure to comply with the Act. 28 U.S.C. §1867(a). I am persuaded that to sanction a failure to adhere to the plan is to sanction a *de facto* modification without the

required approval of the reviewing panel contrary to 28 U.S.C. §1863(a).

For these reasons, I remain persuaded that the indictments must be dismissed.

IT IS SO ORDERED.

ROBERT E. DE MASCIO
U.S. DISTRICT JUDGE

Thus, because of the evident confusion and conflict which exists in the Eastern District of Michigan, and which goes on unabated, simply because the court refuses to speak on the issues which these appellants raised years ago, ample basis exists for the allowance of certiorari defining what type of error requires the quashing of an indictment, and outlining clearly what departures from procedure are to be condemned.

Accordingly, the petitioners urge that certiorari should be granted in the within case to remove the existent confusion, with a minimum of delay.

Respectfully submitted,

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